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08-380

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD BONTKOWSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rule 27(c) of the Federal Rules of Appellate Procedure prohibits a single circuit court judge from dismissing a direct appeal. In this case, a single circuit court judge of the United States Court of Appeals for the Seventh Circuit has entered a one-judge order which dismissed Petitioner's direct criminal appeal with prejudice.

The Questions Presented are:

1. Whether a one-judge order entered by a single circuit court judge dismissing a direct criminal appeal in violation of Rule 27(c) of the Federal Rules of Appellate Procedure, is void, *in ab initio;* and

2. If so, whether there must be a vacatur of the appellate court's mandate which is based upon the void order.

PARTIES INVOLVED

All parties who have an interest in the outcome of this case appear on the caption of the case on the cover of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward Bontkowski prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh entered on June 23, 2008.

JUDGMENT AND OPINION BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 20, 2008 and is unreported. It is reproduced in the Appendix of this Petition at Page No. A-1. Petitioner timely sought rehearing. The Seventh Circuit Court of Appeals entered final judgment on June 23, 2008 and it is unreported. It is reproduced in the Appendix at Page No. B-1.

JURISDICTION

The court of appeals issued its judgment on June 23, 2008, Petitioner did not file a Rule 35 Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The statutory right of every federal criminal defendant to obtain appellate court review of his conviction and sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

II. Rule 27(c) of the Federal Rules of Appellate Procedure which states in pertinent part as follows:

"(c) Power of a Single Circuit Court Judge to Entertain a Motion. A circuit court judge may act alone on any motion, but may not dismiss or otherwise determine an appeal. A court of appeals may provide by rule or order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

III. The Fifth Amendment of the United States Constitution provides that "[n]o person shall be.....deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On June 25, 1998, a federal grand jury sitting in the Northern District of Illinois returned a 26-count Second Superseding Indictment against Petitioner, charging him with mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), failure to file income tax returns (26 U.S.C. § 7203), federal income tax evasion (26 U.S.C. § 7201), and witness intimidation (18 U.S.C. § 1512). [1]

On June 10, 1999, after a four-week trial, a jury convicted Petitioner of all charges alleged in the Second Superseding Indictment except for 3-counts of mail and wire fraud and 2-counts of income tax violations which the trial court has severed into a separate trial. During March of 2000, the trial court granted the Government's motion to dismiss the severed counts.

On August 21, 2000, the trial court sentenced Petitioner to a 60-month concurrent term of imprisonment to the mail fraud, wire fraud and income tax violation charges and also imposed a concurrent 108-month term of imprisonment to the witness intimidation charge. Petitioner was also sentenced to serve a three-year term of supervised release and ordered to pay $313,270.00 in restitution and assessment fees.

Petitioner filed a timely notice of appeal with the Office of the Clerk of the District Court on August 28, 2000. The appeal was docketed in the Court of Appeals for the

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[1] Eleven of the mail and wire charges, alleged in the indictment, charged Petitioner with violating 18 U.S.C. § 1341 and 18 U.S.C. § 1343 for his actions in obtaining "additional time" to pay his personal telephone and electric bills some of which were less than a $100.00.

Seventh Circuit as Appeal No. 00-3218. An order was entered on October 10, 2000, by the 7th Circuit Court of Appeals granting Petitioner leave to proceed on appeal without counsel and the briefing schedule was suspended pending a determination of the Petitioner's fee status on appeal.

On December 26, 2000, the district court granted Petitioner leave to proceed on appeal in forma pauperis and a copy of said order was filed with the Clerk of the Court of Appeals for the 7th Circuit on January 19, 2001.

The official court reporter filed a motion on March 6, 2001 asking for additional time to prepare and file the transcripts. On March 26, 2001, the 7th Circuit entered an order granting the court reporter until March 30, 2001 to file the transcripts. However, the record reveals that the transcripts were not filed until April 3, 2001. Additionally, the record also reveals that a supplemental record consisting of two-volumes of transcripts were not filed until May 31, 2001 [2].

During the period of time the transcripts were being produced, Petitioner also sought several extensions of time to file his opening brief. Said motions were based upon Petitioner not being in possession of the trial transcripts, and because due to the Petitioner being incarcerated, Petitioner's custodians controlled the amount of time and his ability to research and prepare his opening brief.

On July 17, 2001, a one-judge order was entered by the 7th Circuit Court of Appeals granting Petitioner a final extension of time until July 30, 2001 in which to file his

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2. The final volumes of the trial transcripts were not received by the incarcerated pro se Petitioner until sometime towards the end of the first week of June 2001.

opening brief. Said order also warned Petitioner that his appeal would be dismissed pursuant to Local 7th Circuit Rule 31(c), if his opening brief was not filed by the extended due date of July 30, 2001. However, the record shows that the Clerk of the 7th Circuit Court of Appeals did not issue a show cause order upon the Petitioner as required under 7TH Cir. L.R.31(c), after Petitioner failed to file his opening brief on July 30, 2001.

On August 30, 2001, Petitioner filed his opening brief under the prisoner's mail box rule. The Clerk of the 7th Circuit Court of Appeals received Petitioner's opening brief for filing on September 6, 2001. However, on September 10, 2001, a one-judge order was entered by a single circuit court judge of the 7th Circuit which denied Petitioner's motion to file his out of time brief instanter and also dismissed Petitioner's direct criminal appeal with prejudice. Petitioner filed a timely Rule 35 Petition for Rehearing with, En Banc Suggestion asking that a three-judge panel or the full court to review the order of the single circuit court judge. On November 13, 2001, the same circuit court judge who had entered the one-judge order dismissing Petitioner's appeal, entered a one-judge order denying Petitioner's properly styled Rule 35 Petition for Rehearing with En Banc Suggestion after sua sponte recharacterizing the Rule 35 Petition into a Motion for Reconsideration. Then on January 29, 2002, this same circuit court judge entered a one-judge order denying Petitioner's motion to recall the mandate dismissing his direct criminal appeal.

Petitioner then filed a Petition for a Writ of Mandamus in this Court which asked this Court to grant the Writ and enter an order directing the 7th Circuit Court of Appeals to reinstate Petitioner's direct criminal appeal. However on April 1, 2002, this Court entered an order

denying the petition for a writ of mandamus. (See Order List: 535 U.S. Monday, April 1, 2002. at docket no. 01-8661, In Re Edward Bontkowski, Justice Stevens taking no part in the consideration or decision).

On September 9, 2002, Petitioner filed a timely motion under 28 U.S.C. § 2255 seeking to vacate his conviction and sentence. However, the district court adopted the recommendations of the magistrate judge set forth in **United States v. Bontkowski,** 262 F.Supp. 2d 915 (N.D.Ill. 2003), and entered an order dismissing Petitioner's § 2255 motion on September 4, 2003. The district court also entered an order on October 8, 2003, denying Petitioner's application for a Certificate of Appealability (hereinafter referred to as a "COA").

On June 14, 2004, the Seventh Circuit Court of Appeals granted Petitioner a COA in light of this Court's decision in **Massaro v. United States,** 538 U.S. 500, 123 S.Ct. (2003), and entered an order directing the district court to resolve all of the Petitioner's claims that he had been denied his Sixth Amendment Right to effective assistance of counsel.

Two-years later, on June 27, 2006, the district court entered a Memorandum and Opinion Order denying Petitioner's § 2255 motion without holding an evidentiary hearing. On March 15, 2007, the district court judge entered an order denying Petitioner's application for a COA. The Seventh Circuit of Appeals denied Petitioner's Renewed Application for a COA on July 24, 2007. A timely Rule 35 Petition for Rehearing, with En Banc Suggestion was filed by the Petitioner. On August 15, 2007, the 7th Circuit entered an order directing the Government to file an answer to Petitioner's Rule 35 Petition. However, on September 20, 2007, the 7th Circuit

entered an order denying Petitioner's Rule 35 Petition.

On January 11, 2008, Petitioner invoked the 7th Circuit's jurisdiction pursuant to 28 U.S.C. § 2106 and filed a motion to vacate the judgment entered on September 10, 2001 which dismissed his direct criminal appeal on the grounds that said judgment was void in ab initio because Rule 27(c) of the Federal Rules of Appellate Procedure prohibits a single circuit court judge from dismissing an appeal.

On March 20, 2008, the same circuit court judge who had dismissed Petitioner's direct criminal appeal on September 10, 2001, in violation of Rule 27(c) entered a one-judge order denying Petitioner's Motion To Vacate Void Judgment. (See Appendix at A-1).

On April 1, 2008, Petitioner filed a timely Motion for Reconsideration under Rule 27(c) of the Federal Rules of Appellate Procedure. Said motion requested a three-judge panel to review the actions of the single circuit court judge who had denied Petitioner's Motion To Vacate Void Judgment on March 20, 2008. One June 23, 2008, a three-judge panel consisting of the original judge and two other judges entered a three-judge order granting Petitioner's Motion for Reconsideration by a three-judge panel and denied Petitioner's Motion To Vacate Void Judgment which the panel construed as a Motion to Recall the Mandate. (See Appendix at B-1).

REASONS FOR GRANTING CERTIORARI

I.

The United Stats Court of Appeals for the Seventh Circuit has so far departed from the accepted and normal course of judicial proceedings in this case, as to call for an exercise of this Court's supervisory power over the lower courts.

This case presents the Court with the opportunity to maintain the public's confidence in the federal judicial system by exercising its supervisory powers over the lower courts when they disregard the Rules of Appellate Procedure which they are mandated to follow for the reasons stated below,

A. A single circuit court judge of the Seventh Circuit Court of Appeals has unlawfully disentitled Petitioner of his statutory right to obtain appellate review of his conviction and sentence.

The undersigned's research has been unable to unearth a single reported federal appeals case which held that a single circuit court judge may dismiss an appeal. Most probably, because, Rule 27 (c) of the Federal Rules of Appellate Procedure prohibits a single circuit court judge from dismissing a direct appeal. The language contained in Rule 27(c) is plain and unambiguious. Rule 27(c) states in pertinent part as follows:

"**Powers of a Single Judge to Entertain a Motion.** A circuit court judge may act on any motion, ***but may not***

dismiss or otherwise decide an appeal or other proceeding. A court may provide by rule or by order in a particular case that only the court may review the action of a single judge." [Emphasis Added]

See also, **N.L.R.B. v. Brooke Industries Inc.**, 873 F.2d 165, 166 (7th Cir. 1989) (specifically noting that under Fed.R.App.P. 27(c), a single circuit court judge may not dismiss an appeal.

Additionally, the last paragraph to the 1967 Advisory Note to Rule 27(c) of the Federal Rules of Appellate Procedure states:

"A court of appeals may by order or by rule abridge the power of a single judge if it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power granted by a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court."

Although, Congress has generally delegated to the judiciary the power to make rules governing judicial practice and procedure, the final authority for rule making rests ultimately with Congress. **Hanna v. Plummer**, 386 U.S. 460 (1965); **Sibbach v. Wilson**, 312 U.S. 1, (1941). Therefore, it is perfectly clear from the language contained in Rule 27(c) that Congress intended to prohibit a single circuit court judge from dismissing or otherwise deciding an appeal. Likewise, it is also perfectly clear that Congress also intended that any one judge order could be reviewed by a three-judge panel.

The record of this case clearly show that on September 10, 2001, Circuit Court Judge William J. Bauer, entered a

one-judge order dismissing Petitioner's direct criminal appeal. Therefore, Petitioner's appeal was dismissed in violation of Rule 27(c) of the Federal Rule of Appellate Procedure. (See copy of the order included in the Appendix at Page No. C-1).

Likewise, the record of this case also shows that Judge Bauer prevented a three-judge panel from being able to review his one-judge order dismissing Petitioner's appeal by recharacterizing a properly styled Rule 35 Petition for Rehearing, with En Banc Suggestion into a Motion For Reconsideration which he denied in a one-judge order on November 13, 2001. (See copy of the order included in the Appendix at page no. D-1).

Finally, Judge Bauer also prevented a three judge panel from reviewing his one-judge order dismissing Petitioner's appeal by entering a one judge order on January 29, 2002 denying Petitioner's Motion to Recall the Mandate which was based on his one-judge order entered on September 10, 2001. (See copy of the order included in the Appendix at page no. E-1).

B. The order entered by Judge Bauer on September 10, 2001 which dismissed Petitioner's direct criminal appeal is void and cannot serve as the basis to disentitle Petitioner out of his right to have his direct criminal appeal decided by a three-judge panel.

More than a one-hundred and fifty-years ago, this Court acknowledged that courts are constituted by authority "but if they act without authority, its judgments are nullities; they are not voidable but are simply void, and form no bar to recovery sought, even prior to reversal, in opposition to them; they constitute no justification, and all

persons concerned in executing such judgments or sentence, are considered in law as tresspassers." **Williamson v. Berry,** 8 How, 945, 545 12 L.Ed. 1170, 1189 (1850)

Thirty-three years later, this Court set out the essential element which must be present for a judgment to be void in defining the term void judgment. A judgment is void if the rendering court was without power to enter it; that is, if the court entered a decree "not within the powers granted to it by law." **United States *ex rel.* Wilson v. Walker**, 109 S.Ct. 258, 3 S.Ct. 277, 27 L.Ed. 927 (1883).

Rule 27(c) of the Federal Rules of Appellate Procedure Prohibits a single-circuit court judge from dismissing or otherwise deciding an appeal. Therefore, Judge Bauer's one-judge order entered on September 10, 2001 dismissing Petitioner's direct criminal appeal is void.

Additionally, this Court's holding in **Ayrshire Colliers Corp. v. United States**, 331 U.S. 132, 67 S.Ct. 1168, 91 L.Ed. 1391 (1947), also supports Petitioner's claim that Judge Bauer's one-judge order dismissing Petitioner's direct criminal appeal is void.

In **Aryshire,** this Court held that the full compliment of three judges was necessary to enjoin the enforcement of the Interstate Commerce Commission's orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such case "shall be heard and determined by three judges." 331 U.S. at 137. This Court concluded that Congress "meant exactly what it said." *ibid.*, finding it "significant that this Act makes no provision for a quorum of less than three judges" "[t]wo judges of a three-judge circuit court of appeals * * * ordinarily constitute a statutory quorum for the hearing and determination of

cases, *id,* at 138. Thus, **Aryshire**, stands for the proposition that, where Congress expressly says that '[a]ll three judges * * * must fully perform the judicial function," *ibid.*, courts cannot permit less.

Finally, this Court's more recent decision in **Nguyen v. United States**, 539 U.S. 69, 156 L.Ed.2d 64 (2003), also supports Petitioner's claim that Judge Bauer's one-judge order dismissing his direct criminal appeal is void.

In **Nguyen**, this Court vacated a decision by the Ninth Circuit Court of Appeals that was rendered by a panel consisting of two Article III Judges and the Chief Judge of an Article IV territorial court. In reversing the 9th Circuit, this Court held that Congress had not authorized Article IV Judges to serve on courts of appeals and therefore, held that the Chief Judge of the Marianna Islands should not have been allowed to sit on the Ninth Circuit panel for the following reasons:

"First, the quorum statute has been on the books (in relevant part essentially unchanged) for over a century, yet this Court has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal....." (citations omitted) and,

Second,the statutory authority for courts of appeals to sit in panels, 28 U.SC. § 46(b) [28 USCS § 46(b)] requires the inclusion of at least three judges in the first instance. As the Second Circuit noted, Congress apparently enacted § 46(b) in part "to curtail the prior practice under which some circuits were routinely assigning some cases to two judge panels." **Murray v. National Broadcasting Co.,** 35 F.3d 45, 47, (1994)....." ***Id***. **Nguyen,** at 78-79.

Moreover, in **Nguyen**, the Majority Justices responding to the Dissenting Justice specifically noted:

"Unlike the dissent, we believe that it *would* "flou[t] the stated will of Congress." post at 84, 156 L.Ed. 2d, at 80 (opinion of Rehnquist, C.J.), and call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decision below to stand, for *no one* other than a properly constituted panel of three Article III judges was empowered to exercise appellate jurisdiction in these cases."

Id. **Nguyen**, 156 L.Ed.2d at 79, n.17. [Emphasis in the original].

Therefore, in light of this Court holding in **Nguyen** that no one other than a properly constituted panel of three Article III judges was empowered to exercise appellate jurisdiction. Judge Bauer, sitting alone, certainly did not have appellate jurisdiction to enter a one-judge order dismissing Petitioner's direct criminal appeal in violation of Rule 27(c) of the Federal Rules of Appellate Procedure.

C. The One-Judge Order Entered by Judge Bauer on March 20, 2008, denying Petitioner's Motion To Vacate Void Judgment.

As stated above, on January 11, 2008, Petitioner through undersigned counsel filed a motion in the Seventh Circuit Court of Appeals To Vacate Void Judgment pursuant to 28 U.S.C. § 2106 requesting a three-judge panel to review the one-judge order dismissing Petitioner's direct appeal on the grounds that said judgment was void.

On March 20, 2008, Judge Bauer entered a one judge

order denying the Motion To Vacate Void Judgment which states as follows:

"The following is before the court: **MOTION TO VACATE VOID JUDGMENT,** which the court construes as a motion to call the mandate, filed on January 11, 2008, by counsel for appellant.

This appeal was dismissed in accordance with Circuit Rule 31(c)(2) for failure to timely file the opening brief. On June 25, 2001, after having granted six motions of time to file the opening brief, the court first warned the appellant that no further extensions of time would be granted. Despite this warning, the appellant responded with a request for an additional extension of time and to further enlarge the size of the opening brief, even though the court already granted him leave to file an additional ten pages. The court granted an additional extension of time but again warned the appellant that no further extensions of time would be granted. The court also explained that the appeal would be dismissed if he failed to file his opening brief by the due date. Despite these warnings, the appellant tendered a non-compliant brief over one month after the due date. The warnings that the court provided rendered a separate Rule to Show Cause order unnecessary. Unlike the cases that the appellant cites, the dismissal of the appeal was not a substantive merits dismissal but was an administrative dismissal for failure to follow the court's orders. This Court's operating procedure permit the Clerk of the Court to dismiss an appeal for failure to prosecute when an appellant fails to file a brief. *See United States Court of Appeals for the Seventh Circuit Operating Procedures 7(a).* Simply because one judge was involved in this dismissal based on his ruling on the requests for leave to file an oversized brief does not mean that three judges were required to take

routine action.

Accordingly, **IT IS ORDERED** that the motion is **DENIED**. (See Appendix at page no. A-1).

In the Order, Judge Bauer fails to mention that four of the Petitioner's motions seeking extensions of time were brought on the grounds that the trial transcripts were still being produced and had not yet been delivered to the Petitioner and because prison officials controlled the Petitioner's ability to research and prepare his brief. In fact, as stated above at pg. 4, f.n. 2, the final volumes of the trial transcripts were not delivered to the Petitioner until the end of the first week of June 2001.

Judge Bauer also incorrectly states in the order that the Petitioner's brief was filed more than a month after the extended due date because the Petitioner's opening brief was filed under the prisoner's mail box rule on August 30, 2001, exactly thirty days past the extended due date. [3]

Also, Judge Bauer setting a final filing deadline, which he knew or should have known, the pro se Petitioner could not meet due to his being incarcerated is contrary to the reasoning of the Majority Justices in **Stutson v. United States**, 513 U.S. 193 (1996), wherein they wrote:

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[3] Petitioner's briefs were actually prepared to be filed on August 23, 2001. However, because Petitioner was filing 15 copies of his opening brief along with 10 copies of the required appendix contained in two boxes which did not fit in the prisoner's legal mail box located in the main yard of FCC Coleman, prison officials required the Petitioner to mail the boxes through the mail room which resulted in the Petitioner having to wait until August 30, 2001 to mail his briefs to the Office of the Clerk of the Seventh Circuit.

"Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solitude for his rights, to which the public's interest in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities which caused no prejudice to the prosecution to preclude a remand under 28 U.S.C. § 2106 (1988 ed.) "in the interest of justice." **Wood v. Georgia,** 450 U.S. 261, 265, n. 5 (1981). And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. See, e.g., 28 U.S.C. 2255 (1988 ed.) (habeas review in spite of an adverse final appellate decision); **Evitts v. Lucey,** 469 U.S. 387 (1985) (relief for ineffective assistance of retained counsel on appeal); **Schacht v. United States,** 398 U.S. 58, 63-64 (1970) (unlike in civil cases time limits for petitions for certiorari are not jurisdictional). To the extent that the dissent suggests that it is inconsistent with our "traditional practice," post, at 2 (SCALIA, J. dissenting), to call upon a Court of Appeals to reconsider its dismissal of a prisoner's appeal because his lawyer filed it one day late, in circumstances where the Court of Appeals' decision may have been premised on the assumption, unanimously rejected by other Courts of Appeals, that more stringent rules as to filing deadlines apply to prisoners than to creditors filing claims in a bankruptcy proceeding, we must respectfully disagree." ***Id.*** **Stutson.**

Here, the Government did not suffer any prejudice as the result of Petitioner filing his brief past the due date, nor did the Government file a motion under Fed.R.App.P. 31(c), asking the court to dismiss Petitioner's direct criminal appeal.

Moreover, Judge Bauer stating in his order that "The warnings the court provided rendered a separate Rule to Show Cause order unnecessary" prior to Petitioner's appeal being dismissed is inconsistent with the fundamental requirement of due process to be heard at a meaningful time and in a meaningful manner reaffirmed by this Court in **Armstrong v. Manzo**, 380 U.S. 545 85 S.Ct. 1187, 14 L.Ed.2d 62, (1965).

In fact, 7th Circuit Local Rule 31(c) requires the clerk to automatically issue a Show Cause Order when the Appellant fails to file a brief to assure the Appellant is heard prior to an appeal being dismissed. This Rule states in pertinent parts as follows:

"**(c) Failure of Appellant to File Brief:** When an appellant's original brief is not filed when it is due, the procedure shall be as follows:

(1) All Criminal Cases in Which the Defendant Has Counsel and Civil Cases With Court-Appointed Counsel. The Clerk shall enter an order directing counsel to show cause within 14 days why disciplinary action should not be taken. The court will then take appropriate action.

(2) All Other Cases. The clerk shall enter an order directing counsel, or a pro se appellant to show cause why the appeal should not be dismissed. The court will then take appropriate action." (See Appendix at Page No. F-1)

The words, **shall enter an order** set forth in 7th Circuit Local Rule 31(c) mandates the clerk to issue a Show Cause Order upon an appellant when an appellant fails to file his opening brief. It also appears that once a show cause order is entered under 7th Cir,L.R. 31(c), the

appellant obtains an additional 14 days in which to file his opening brief.

Additionally, the words, **The Court will then take appropriate action** set forth in 7th Circuit Local Rule 31 (c), indicates that a three-judge panel of the 7th Circuit will take appropriate action after the Show Cause Order had been entered.

Therefore, Judge Bauer mistakenly states in his order of March 20, 2008 that a separate Rule to Show Cause Order was not necessary prior to his entering the one-judge order dismissing Petitioner's direct criminal appeal.

Additionally, Judge Bauer also mistakenly states in his Order of March 20, 2008, that the clerk may dismiss an appeal under Rule 7(a) of the United States Court of Appeals for the Seventh Circuit Court of Appeals and that "Simply because one judge was involved in this dismissal based on his ruling on the request to file an oversize brief does not mean that three judges were required to take routine action."

Although, Rule 7(a) does state that the clerk may dismiss an appeal when the appellant fails to pay the docketing fee, file a docketing statement or file a brief, nevertheless, Rule 7(a) also requires the clerk to follow a specific procedure before any order is entered dismissing an appeal. Rule 7(a) of the Internal Operating Procedures for the Seventh Circuit of Appeals states as follows:

" Routine Action by the Clerk

(a) ***Dismissal for Failure to Prosecute.*** Statutes and rules of court call for the parties to take specified steps at particular times, and the court treats failure to

take some of these steps as failure to prosecute, leading to dismissal. Failure to pay the docket fee, failure to file the docketing statement required by Circuit Rule 3(c), and the failure by the appellant or petitioner to file brief, amount to abandonment of the appeal.

(1) Seven days after the docket fee, docketing statement, or brief is due, the Clerk will send notice, by certified mail, reminding the party of the obligation. The notice will inform the party about the consequences of continued delay in satisfying the obligation.

(2) If the party does not respond within 21 days of the date of the notice, the Clerk will enter an order dismissing the appeal for want of prosecution. In a criminal case with appointed counsel, however, the Clerk will not dismiss the appeal but will instead discharge the lawyer and appoint new counsel. When counsel is discharged under this procedure, the Clerk also will enter an order requiring the lawyer to show cause why abandonment of the client should not lead to disbarment.

(3) If the party responds within 21 days but does not comply with the obligation, or if the Clerk has not received a receipt showing delivery of the notice, a staff attorney will present the papers to the motion panel for a decision." (See Appendix at Page No. G-1)

Therefore, Rule 7(a) of the 7th Circuit's Internal Operating Procedures requires the Clerk to give a party notice prior to entering an order dismissing an appeal. However, as stated by Judge Bauer in his Order of March 20, 2008, a separate Rule to Show Cause was unnecessary in the Petitioner's case prior to Petitioner's appeal being dismissed.

Moreover, because the Clerk did not provide Petitioner

with notice as required under Rule 7(a)(1) of the 7th Circuit's Internal Operating Procedures prior to Petitioner's appeal being dismissed, any order which the Clerk could have entered dismissing Petitioner's appeal would have been in violation of Rule7(a) of the 7th Circuit's Internal Operating Procedures.

Accordingly, in light of the Clerk's failure to comply with Rule 7(a)(1), Judge Bauer mistakenly states in his order of March 20, 2008, that the Clerk could have entered the order dismissing Petitioner's direct criminal appeal.

This Court does not merely sit to correct errors by other courts. It does however, have supervisory authority over the other federal courts when they adopt and enforce local rules to ensure that these local rules are in fact consistant with the "'principles of right and justice.'" **Frazier v. Heebe**, 482 U.S. 641, 96 L.Ed. 2d 557, 107 S.Ct. 2607, (1997) (citing **In re Ruffalo**, 390 U.S. 544, 554, 20 L.Ed.2d 117, 88 S.Ct. 1222, (1968) at pg. 565). In **Frazier**, this Court used its supervisory authority to declare a Federal District Court rule that Louisiana bar members maintain an office in Louisiana in order to be admitted to the District Court to be invalid.

Here, according to Juge Bauer's Order of March 20, 2008, the Clerk of the 7th Circuit could dismiss an appeal under Rule 7(a) of the 7th Circuit's Operating Procedures without giving a party notice.

Additionally, Rule 7(a) of the Internal Operating Procedures of the Seventh Circuit Court of Appeals treats defendants who are represented by court appointed counsel on appeal differently, from those defendants who are proceeding pro se before the Seventh Circuit of Appeals. As stated above, when a defendant's attorney

fails to file a brief, the clerk will not dismiss the appeal, but will appoint new counsel and issue a show cause order upon the attorney who has abandoned his client. This different treatment violates the equal protection clause of the 14th Amendment incorporated into the Due Process Clause of the Fifth Amendment to the United States Constitution.

A federal criminal defendant does not possess a Constitutional Right to a criminal appeal because the right to a criminal appeal is a creature of statute. **Abney v. United States**, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Nonetheless, in cases to many to cite herein, this Court has repeatedly held that if a State has created appellate courts as "an integral part of the .....system for finally adjudicating guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. **Griffin v. Illinois**, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). In **Griffin**, itself, a transcript of the trial court proceedings was a prerequisite to a decision on the merits of an appeal This Court held that the State must provide such a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective appeal. ***Id.*** 351 U.S. at 20.

In this case, Petitioner's trial commenced on or about May 6, 2000 and did not conclude until June 9, 2000. Without the trial transcripts it would have been impossible for the Petitioner who was incarcerated and proceeding pro se on appeal to research and prepare his brief. Moreover, as stated above, Petitioner did not receive the final two volumes of the trial transcripts until the end of the first week of June 2001. Therefore, the Petitioner causing his opening briefs to be filed under the prisoner's

mail box rule on August 30, 2001, can hardly constitute needless delay.

Rule 7(a)(2) of the 7th Circuit's Internal Operating Procedures does not allow the clerk to enter an order dismissing an appeal when a defendant's appointed attorney fails to file a brief. Therefore, if the Petitioner had been represented by appointed counsel, the clerk could not enter an order dismissing Petitioner's appeal. It appears, however, that the clerk may dismiss an appeal if a pro se appellant fails to file a timely brief. In either event however, Rule 7(a)~~(1)~~ still requires the clerk to give the party notice via certified mail. In this case, as stated above, the clerk did not serve any notice upon the Petitioner prior to Judge Bauer entering the one-judge order dismissing Petitioner's appeal. Moreover, Petitioner's opening brief was actually received by the 7th Circuit's Clerk's Office for filing 4 days before Judge Bauer dismissed Petitioner's appeal on September 10, 2001.

The Fifth Amendment provides that "[n]o person shall be .....deprived of life, liberty, or property, without due process of law..." In numerous decisions this Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *See e.g.*, **Mow Sun Wong**, 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976); **Buckley v. Valeo**, 424 U.S. 1, 93 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976); **Weinberger v. Wiesenfeld**, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1225, 1228, 43 L.Ed.2d 514 (1975); **Bolling v. Sharpe**, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954)." Thus, the equal protection component of the Due Process Clause confers on petitioner a federal constitutional right to be free from unlawful discrimination.

Rule 7(a) of the Internal Operating Procedures of the Seventh Circuit Court of Appeals unlawfully discriminates against those persons who are proceeding with appointed counsel and those persons who are proceeding before the Seventh Circuit Court of Appeals without counsel. This unlawful discrimination arises from the fact that Rule 7(a)(2) allows the clerk to dismiss appeals brought by litigants who are proceeding without counsel when they fail to file a timely brief and does not allow the clerk to dismiss the appeal of a litigant who is represented by appointed counsel when the attorney fails to file a timely brief.

Consequently, Rule 7(a) of the Internal Operating Procedures of the Seventh Circuit Court of Appeals cannot serve as grounds for the Clerk of the 7th Circuit Court of Appeals to dismiss Petitioner's direct criminal appeal as Judge Bauer suggests in his Order of March 20, 2008.

II.

The Mandate of the Seventh Circuit Court of Appeals in this case which is based upon the one-judge order dismissing Petitioner's direct criminal appeal should be recalled by the Seventh Circuit to protect the public's confidence in the federal judicial system.

The Seventh Circuit's mandate issued in this case is based upon the one-judge order entered by Judge Bauer on September 10, 2001 in direct violation of Rule 27(c) which dismissed Petitioner's direct criminal appeal. Because, Rule 27(c) of the Federal Rules of Appellate Procedure prohibits a single circuit judge from dismissing or otherwise deciding an appeal, the one-judge order entered on September 10, 2001, cannot serve as the basis to support the mandate of the Seventh Circuit of Appeals issued in this case because the one-judge order is void in ab initio.

Moreover, the three-judge order entered by a panel of the Seventh Circuit Court of Appeals on June 23, 2008, does not cure the void nature of the one-judge order entered on September 10, 2001. As stated by this Court in **Ayrshire**, *supra*, when this Court entered its ruling:

"Since the judgment entered by two judges in this case was void and without authority, we have no other alternative but to vacate the judgment and dismiss the appeal. Appellants will be free, of course to suggest that the District Court reconvene in accordance with the Act, so that three judges may hear and determine the application to enjoin the Commission order in issue. So ordered, Judgment vacated and appeal dismissed. ***Id.***

Finally, as stated by this Court in **Nguyen,**

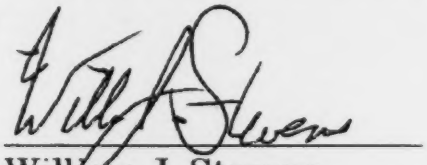
"Unlike the dissent, we believe that it *would* "[f]lout the stated will of Congress," *post,* at 84, 156 L.Ed.2d, at 80 (opiniom of Rehnquist, C.J.), and call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decision below to stand, for *no one* other than a properly constituted panel of Article III Judges was empowered to exercise appellate jurisdiction in these cases."

***Id.*, Nguyen** 156 L.Ed.2d at pg, 79, f.n. 17.

Conclusion

For the reasons stated, the Court should grant the petition.

Respectfully submitted,



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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 20, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

United States of America, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of Illinois,
No. 00-3128	) Eastern Division.
	) No. 97 CR 295
Edward Bontkowski, Defendant-Appellant.	) Elaine E. Bucklo. Judge

The following is before the court: **MOTION TO VACATE VOID JUDGMENT,** which the court construes as a motion to recall the mandate, filed on January 11, 2008, by counsel for the appellant.

This appeal was dismissed in accordance with Circuit Rule 31(c)(2) for failure to timely file the opening brief. On June 25, 2001, after having granted six motions of time to file the opening brief,
the court first warned the appellant that no further extensions of time would be granted. Despite, this warning, the appellant responded with a request for an additional extension of time and to further enlarge the size of the opening brief, even though, the court had granted him leave to file an additional ten pages. The court granted an additional extension of time but again warned the appellant that no further extensions would be granted . The court also explained that the appeal would

be dismissed if he failed to file the opening brief by the due date. Despite these warnings, the appellant tendered a non-compliant, oversize brief over one month after the due date. The court dismissed the appeal in accordance with its prior orders. The explicit and repeated warnings that the court provided rendered a separate Rule to Show Cause order unnecessary. Unlike the cased that the appellant cites, the dismissal of the appeal was not a substantive merits dismissal but was an administrative dismissal for failure to follow the court's orders. This Court's operating procedure permit the Clerk of the Court to dismiss an appeal for failure to prosecute when an appellant fails to file a brief. *See United States Court of Appeals for the Seventh Circuit Operating Procedures Rule 7(a).* Simply because one judge was involved in this dismissal based on his ruling on the request for leave to file an oversize brief does not mean that three judges were required to take routine action.

Accordingly,

IT IS ORDERED that the motion is **DENIED.**

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 23, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*
JOEL M. FLAUM, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*

United States of America, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of
No. 00-3218	) Illinois, Eastern Division.
	) No. 97 CR 295
Edward Bontkowski, Defendant-Appellant.	) Elaine E. Bucklo, Judge

Upon consideration of the **APPELLANT'S MOTION FOR RECONSIDERATION OF A ONE-JUDGE ORDER BY A THREE-JUDGE PANEL,** filed by the pro se appellant.

IT IS ORDERED that the appellant's request for reconsideration by a three-judge panel is **GRANTED.**

After careful consideration by the three-judge panel.

IT IS FURTHER ORDERED that the motion to recall the mandate and vacate the dismissal of the appeal is **DENIED.**

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Date: September 10, 2001

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

No. 00-3218

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD BONTKOWSKI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 CR 295, Elaine E. Bucklo, Judge

The following is before the court: **APPELLANT'S MOTION FOR LEAVE TO FILE HIS BRIEF INSTANTER AND/FOR LEAVE TO FILE OVERSIZED BRIEF,** filed on September 6, 2001, by the pro se appellant.

IT IS ORDERED that the motion is **DENIED.** This Court has granted appellant numerous extensions of time to file his opening brief. On June 23, 2001, this Court extended the deadline until July 18, 2001, and informed the appellant that no further extensions of time would be granted. This notwithstanding, this Court granted one more final extension until July 30, 2001. The order, however, warned that absolutely no further extensions of time would be granted and that the appeal would be

dismissed if appellant failed to file an opening brief by the due date. Appellant failed to timely file an opening brief despite numerous warnings by this Court. Appellant's instanter motion is too late.

Accordingly, this appeal is **Dismissed** for failure to prosecute. See Cir. R. 31 (c) (2).

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 13,2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

United States of America, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of Illinois,
No. 00-3218	) Eastern Division.
	) No. 97 CR 295
Edward Bontkowski, Defendant-Appellant.	) Elaine E. Bucklo, Judge

Upon consideration of the **MOTION FOR RECONSIDERATION,** filed on September 28, 2001, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED.**

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 2002

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

United States of America, Plaintiff-Appellee,	) Appeal from the United States District Court for Northern District of Illinois,
No. 00-3218	) Eastern Division.) No. 97 CR 295
Edward Bontkowski, Defendant-Appellant.	) Elaine E. Bucklo, Judge.

Upon consideration of the **APPELLANT'S MOTION AND MEMORADUM OF LAW TO RECALL MANDATE,** FILED ON January 15, 2002, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED.**

Seventh Circuit Local Rule 31(c)

CIRCUIT RULE 31. Filing of Briefs and Failure to Timely File Briefs

(a) *Time for Filing Briefs.* Except in agency cases, the time for filing briefs shall run from the date the appeal is docketed, regardless of the completeness of the record at the time of docketing, unless the court orders otherwise.

(b) *Number of Briefs Required.* The clerk of the court is authorized to accept 15 copies of the briefs as substantial compliance with Rule 31(b), Fed.R.App.P. Appointed counsel shall also file 15 copies.

(c) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows:

(1) *All criminal cases in which the defendant has counsel and civil cases with court-appointed counsel.* The clerk shall enter an order directing counsel to show cause within 14 days why disciplinary action should not be taken. The court will then take appropriate action.

(2) *All other cases.* The clerk shall enter an order directing counsel, or pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action.

Rule 7(a) of the Internal Operating Procedures of the United States Court of Appeals for the Seventh Circuit.

7. Routine Actions by the Clerk

(a) ***Dismissal for Failure to Prosecute.*** Statutes and rules of the court call for the parties to take specified steps at particular times, and the court treats failure to take some steps as failure to prosecute, leading to dismissal. Failure to pay the docket fee, failure to file the docketing statement required by Circuit Rule 3(c), and failure by the appellant or petitioner to file a brief, amount to abandonment of the appeal.

(1) Seven days after the docket fee, docketing statement, or brief is due, the Clerk will send notice, by certified mail, reminding the party of the obligation.

(2) If the party of counsel does not respond within 21 days of the date of the notice, the Clerk will enter an order dismissing the appeal for want of prosecution. In a criminal case with court appointed counsel, however, the Clerk will not dismiss the appeal but will instead discharge the lawyer and appoint new counsel. When counsel is discharged under this procedure, the Clerk also will enter an order requiring the lawyer to show cause why abandonment of the client should not lead to disbarment.

(3) If the party responds but does not comply with the obligation, or if the clerk has not received a receipt showing delivery of the notice, a staff attorney will present the papers to the motions panel for a decision.